

NO. 21153

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS SANDERS, et al.,

Appellants,

vs.

JOHN ERRECA, et al.,

Appellees.

See Vol. 3384
FILED

JUN 19 1967

WM. B. LUCK, CLERK

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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TOPICAL INDEXPage

Table of Authorities	ii
PETITION FOR REHEARING	1
INTRODUCTION	2
THERE SHOULD BE AN OPPORTUNITY TO ADDRESS THE COURT RE JURISDICTION.	3
INTERFERENCE WITH USE OF ONE'S PROPERTY UNDER COLOR OF EMINENT DOMAIN IS ACTION- ABLE IN FEDERAL COURTS.	3
CONSTITUTIONAL RIGHTS ARE IMPAIRED BY UNLAWFUL THREATS OF LITIGATION BY STATE OFFICIALS.	5
CONCLUSION	5
CERTIFICATE	6

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
American Mercury Inc v. Chase (1926), 13 F. 2d 224	5
Bantam Books v. Sullivan (1963), 372 U. S. 58	5
Brown Shoe Co. v. United States (1962), 370 U. S. 294	3
Connor v. Board of Commissioners, etc. (1926), 12 F. 2d 789	5
Cuyahoga Power Company v. Akron (1916), 240 U. S. 462	4
Dalche v. Levee Commissioners (1930), 46 F. 2d 340	4
Dombrowski v. Pfister (1965), 380 U. S. 479	5
Dupes v. Johnson (1965, 6th Cir.), 353 F. 2d 103	3
Foster v. Detroit (1966), 255 F. Supp. 655	3
Foster v. Herley (1964, 6th Cir.), 330 F. 2d 87	3
Fuller v. Volk (1965, 3rd Cir.), 351 F. 2d 323	3
Gilmore v. Sandersville R. Co. (1955), 149 F. Supp. 725	4
Harvey v. Sadler (1964), 331 F. 2d 387	4
Hix v. City of Los Angeles (1957, 9th Cir.), 240 F. 2d 495	4
Londoner v. Denver (1908), 210 U. S. 373, 52 L. Ed. 1103	2
Lowe v. Manhattan Beach City School Dist. (1955, 9th Cir.), 222 F. 2d 258	4

	<u>Page</u>
McGuire v. Sadler (1964, 5th Cir.), 337 F. 2d 902	4
McKoy v. Schonwald (1965, 10th Cir.), 341 F. 2d 737	4
Miller v. County of Los Angeles (1965, 9th Cir.), 341 F. 2d 964	4
Mosher v. Phoenix (1932), 287 U. S. 29	4
Norwood v. Baker (1898), 172 U. S. 269	4
Sherwood v. Bradford (1965), 246 F. Supp. 550 (appeal dismissed)	4
Walker v. Selmont Oil Corporation (1957, 6th Cir.), 240 F. 2d 912	3
L. B. Wilson v. F. C. C. (1948, D. C.), 170 F. 2d 793	2

Constitution

United States Constitution:

Fifth Amendment	3
Fourteenth Amendment	3

Statutes

28 U. S. C. §1331	1, 2, 3, 4
28 U. S. C. §1343	1
42 U. S. C. §1983	1, 2

Rules

United States Court of Appeals for the Ninth Circuit, Rule 23	2, 3
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Texts

Nichols on Eminent Domain, Vol. 2, p. 407	4
Nichols on Eminent Domain (Rev. 3rd Ed.), Vol. 6, pp. 575, 576	4

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Appellees.

PETITION FOR REHEARING

Appellants respectfully petition this Honorable Court for a rehearing.

The grounds of this Petition are briefly stated below, and supported by authorities elsewhere in this Petition. The grounds are:

(a) That by not being afforded an opportunity to be heard by any court on jurisdiction - the sole issue which this Court sua sponte deems controlling - Appellants have been deprived of their day in Court and of due process of law.

(b) That federal courts have jurisdiction herein both under 28 U.S.C. §1331 and 28 U.S.C. §1343 as to both a deprivation of property rights protected by the Constitution and by 42 U.S.C. §1983.

(c) That if a question as to jurisdiction arises after the case has been briefed and argued, the case should be remanded to the District Court for a determination of jurisdiction or, in the alternative, the parties should be given an opportunity to be heard re jurisdiction.



(d) That a deprivation of a constitutionally protected right can, and in the case at bench has occurred, without physical seizure of Appellants' property.

Inasmuch as the Court's Opinion herein cites no authority, and since Appellants respectfully submit that such opinion is a clear departure from the holdings in many cases of the U.S. Court of Appeals for the Ninth Circuit (cited in the briefs and in this Petition), Appellants respectfully suggest, pursuant to Rule 23, that this case be reheard en banc.

INTRODUCTION

Inasmuch as the Court has sua sponte based its decision upon lack of federal jurisdiction - an issue which was never raised or mentioned at any stage of these proceedings - Appellants have been deprived of their day in court. Due process requires an opportunity to present one's contentions to the adjudicating tribunal. Londoner v. Denver (1908), 210 U.S. 373 at 386, 52 L. Ed. 1103, 1112; L. B. Wilson v. F. C. C. (1948, D.C.), 170 F. 2d 793, 802.

Appellants also respectfully wish to call to the Court's attention two inaccuracies contained in the Opinion. The first is the recitation that Appellants rely on 42 U.S.C. §1983. Actually, Appellants' first ground of reliance is 28 U.S.C. §1331 (see Amended Complaint, Paragraph 1).

Second, the Court's attention is respectfully invited to Paragraph 9 of the Amended Complaint wherein Appellants do claim a taking and deprivation of various property rights (cf., p. 6 of the Court's Opinion).

THERE SHOULD BE AN OPPORTUNITY TO ADDRESS
THE COURT RE JURISDICTION

Where the question of jurisdiction has not been presented to the Court by the parties, the Judgment of the District Court should be vacated and the case remanded to it for consideration of the question of jurisdiction. Walker v. Selmont Oil Corporation (1957, 6th Cir.), 240 F. 2d 912 at 916; Dupes v. Johnson (1965, 6th Cir.), 353 F. 2d 103 at 105; Fuller v. Volk (1965, 3rd Cir.), 351 F. 2d 323 at 330. For an alternative procedure for dealing with the issue of jurisdiction raised sua sponte by an Appellate Court, see Brown Shoe Co. v. U.S. (1962), 370 U.S. 294 at 305.

INTERFERENCE WITH USE OF ONE'S PROPERTY
UNDER COLOR OF EMINENT DOMAIN IS ACTION-
ABLE IN FEDERAL COURTS

There need not be a physical appropriation to constitute a "taking" within the meaning of the 5th and 14th Amendments to the U.S. Constitution. Foster v. Detroit (1966), 256 F. Supp. 655. The Court's attention is invited, in particular, to pp. 661-664 of Foster citing and discussing numerous cases. (The stringent limitations of Rule 23 prevent Appellants from discussing such cases in this Petition. We, therefore, respectfully ask the Court to refer to Foster, supra.)

Bad faith initiation of state eminent domain proceedings resulting in economic injury gives rise to a federal cause of action under 28 U.S.C. §1331, Foster v. Herley (1964, 6th Cir.), 330 F. 2d 87. Please note the factual similarity between Foster and the case at bench.

Complaints of abuse of the State's power of eminent domain properly invoke federal jurisdiction under 28 U.S.C. §1331 and the

Civil Rights Act. Cuyahoga Power Company v. Akron (1916), 240 U.S. 462; Mosher v. Phoenix (1932), 287 U.S. 29; Norwood v. Baker (1898), 172 U.S. 269; Dalche v. Levee Commissioners (1930), 46 F. 2d 340, 342; Gilmore v. Sandersville R. Co. (1955), 149 F. Supp. 725, 729; Sherwood v. Bradford (1965), 246 F. Supp. 550 (appeal dismissed).

"Irrespective of diversity of citizenship, if an owner of property is deprived of his property ^{1/} under color of the state's power of eminent domain but without statutory or other legal authorization in violation of his rights under the federal constitution, he may institute action in the first instance in the in the federal district court." Nichols on Eminent Domain (Rev. 3rd Ed.), Vol. 6, p. 576. Also see Nichols, Id., Vol. 6, p. 575.

Interference with property rights by state officials gives rise to a right of action properly within federal jurisdiction under 28 U.S.C. §1331, irrespective of diversity of citizenship. Lowe v. Manhattan Beach City School Dist. (1955, 9th Cir.), 222 F. 2d 258; Miller v. County of Los Angeles (1965, 9th Cir.), 341 F. 2d 964; Hix v. City of Los Angeles (1957, 9th Cir.), 240 F. 2d 495, 497; McGuire v. Sadler (1964, 5th Cir.), 337 F. 2d 902, 905; McKoy v. Schonwald (1965, 10th Cir.), 341 F. 2d 737, 739. Also see Harvey v. Sadler (1964), 331 F. 2d 387.

^{1/} "The modern and prevailing view is that any substantial interference with private property which destroys or lessens its value, or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a 'taking' in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed." Nichols on Eminent Domain, Vol. 2, p. 407.

CONSTITUTIONAL RIGHTS ARE IMPAIRED BY
UNLAWFUL THREATS OF LITIGATION BY STATE
OFFICIALS.

Unlawful threats by government officials to institute legal proceedings constitute an interference with constitutional rights. Dom-browski v. Pfister (1965), 380 U.S. 479; Bantam Books v. Sullivan (1963), 372 U.S. 58 (particularly see Footnote 8, 372 U.S. at 67); American Mercury Inc. v. Chase (1926), 13 F. 2d 224; Connor v. Board of Commissioners, etc. (1926), 12 F. 2d 789, 791.

CONCLUSION

Appellants hope that the Court will consider as appropriate herein an expression of Appellants' profound dismay and anguish at having had to experience the expenditure of time and money, to say nothing of the emotional burdens of a hard-fought litigation in the District Court and the Court of Appeals, without ever having had an opportunity to be heard on the sole issue which the Court deems controlling.

Appellants respectfully pray that this Honorable Court grant them a rehearing so that they may be afforded somewhere in this litigation a meaningful opportunity to be heard.

Respectfully submitted,

FADEM AND KANNER

By: GIDEON KANNER

Attorneys for Appellants.

CERTIFICATE

I certify that in my judgment the foregoing Petition for Rehearing is well founded and is not interposed for purposes of delay.

I further certify that, in connection with the preparation of said Petition, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the said foregoing Petition is in full compliance with those rules.

/s/ Gideon Kanner

GIDEON KANNER

